No. 91-1306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

GUY W. OLANO, JR. and RAYMOND M. GRAY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT GUY W. OLANO, JR.

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QUESTION PRESENTED

Whether the court of appeals properly deemed reversible the district court's plain error of allowing alternate jurors to be present during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c).

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STATEMENT OF THE CASE

On December 8, 1986, Respondent Guy W. Olano, Jr. and eight co-defendants, including Respondent Raymond M. Gray, were charged in a multi-count indictment alleging a loan kickback scheme among officers and directors of several savings and loan associations. Olano was the Chairman of the Board of Directors of Alliance Federal Savings & Loan in Kenner, Louisiana.[1] He was charged

[1] The indictment was returned in United States District Court for the Western District of Washington. One of the savings and loans, Home Savings & Loan Association, was located in Seattle.

with conspiracy, in violation of 18 U.S.C. § 371; wire fraud, in violation of 18 U.S.C. § 1343; interstate transportation of stolen property, in violation of 18 U.S.C. § 2314; misapplication of funds, in violation of 18 U.S.C. § 657; two counts of making false statements, in violation of 18 U.S.C. § 1006, and submitting false loan documents for the purpose of influencing a savings and loan association, in violation of 18 U.S.C. § 1014. Pet. App. 4a.

The trial of Olano, Gray, and five of the co-defendants began on March 2, 1987. J.A. 4-5. Fourteen jurors initially were selected to hear the evidence. No alternates were designated. Instead, each side reserved one challenge to be used at the end of trial, and the jurors challenged would be the alternates. J.A. 20-21.

Near the end of trial, the district court urged counsel to allow the alternates to stay with the jury during deliberations. Specifically, the court stated:

> My last question, and I'd just like you to think about it, you have a day, let me know, it's just a suggestion and you can—if there is even one person who doesn't like it we won't do it, but it is a suggestion that other courts have followed in long cases where jurors have sat through a lot of testimony, and that is to let the alternates go in but not participate, but just to sit in on deliberations.

J.A. 79. After making its suggestion, the court then explained in some detail what it saw as the advantages from using this procedure, as follows:

> It's strictly a matter of courtesy and I know many judges have done it with no objections from counsel. One of the other things it does is if they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open. It also keeps people from feeling they've sat here for three months and then just kind of get kicked out. But it's certainly not worth—unless it's something you all agree to, it's not worth your spending time hassling about, you know what I mean? You've got too much else on your mind. I don't want it to be a big issue; it's just a suggestion. Think about it and let me know.

J.A. 79.

Later the same day, the district court again raised the issue. This time Respondent Gray's attorney objected to the alternates' presence in the jury room:

> THE COURT: [H]ave you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?
> MR. ROBISON [counsel for Gray]: We would ask they not.
> THE COURT: Not.

J.A. 82.

Apparently, an additional off-the-record discussion of the matter occurred and the next day the following exchange occurred on the record:

> THE COURT: Do I understand that the defendants now—it's hard to keep up with you, Counsel. It's sort of a day by day—but that's all right. You do all agree that all fourteen deliberate?
> Okay. Do you want me to instruct the two alternates not to participate in deliberation?
> MR. KELLOGG [counsel for co-defendant Hilling]: That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations.

J.A. 86. Olano's counsel remained silent during this exchange.

The district court made plain its pleasure with counsel's action. The court praised counsel for accepting the suggestion that the alternates be present during jury deliberations: "I'm kind of glad you reached that deci-

sion, Counsel. I kind of think they deserve it. They really have been just a superb jury, and I think they'll be glad." J.A. 87.

At the end of its instructions, the district court informed the jurors that all 14 of them would be present for deliberations, and it instructed that the two who would be designated as alternates were not to participate. The court stated:

> [W]hat we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to the law, the alternates must not participate in the deliberations. It's going to be hard, but if you are an alternate, we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we want you to be able to step in having heard the deliberations. But we are going to ask that you not participate.

J.A. 89-90. The court then announced the names of the alternates, and the jury retired for deliberations. The next day the court granted the request of one of the alternates to be excused. J.A. 5. The other alternate remained with the jury throughout deliberations, which lasted from May 28th through June 3rd, 1987. J.A. 5-6.

The jury found Olano guilty on eight of the nine counts on which he was charged. Gray was convicted on all counts on which he was charged. Two co-defendants, Davy Hilling and David P. Neubauer, were acquitted on all substantive counts but found guilty of conspiracy. Their convictions were subsequently overturned on appeal. *United States* v. *Hilling*, 891 F.2d 205 (9th Cir. 1988). The other three defendants were acquitted of all charges. Olano was sentenced to three consecutive five-year terms to be followed by five years probation, which was later reduced, J.A. 7r, and ordered to make restitution. Because Olano was in custody throughout trial and while

the appeal was pending, he has served his sentence and has been released on parole.

The court of appeals reversed. The court held that the evidence was insufficient to convict Olano on two counts and Gray on three counts.[2] Pet. App. 17a, 20a. The court then set aside their convictions on all remaining counts. It held that the district court violated Federal Rule of Criminal Procedure 24(c) by allowing the alternates to be present during jury deliberations, an error which "falls within the plain error doctrine." Pet. App. 30a, n.23.

The court of appeals found that Rule 24(c) unambiguously requires alternates to be discharged when the jury retires to deliberate. Moreover, the court observed that, in amending the Federal Rules of Criminal Procedure in 1983, the Advisory Committee squarely rejected the procedure followed by the district court in this case because of the "inherent constitutional and practical difficulties with such practices." Pet. App. 24a. Thus, the court of appeals concluded, the plain language of the Rule, the Advisory Committee notes, as well as Ninth Circuit precedent "clearly establish" that the procedure followed by the district court was erroneous. *Id.*

Although by its terms Rule 24(c) does not allow any waiver, the court of appeals cited prior cases in which the Ninth Circuit had allowed defendants personally to consent to waiver of its protections. In this case, however, Olano and Gray did not give their personal consent. Indeed, the court noted that the record provides "some support" for Olano's statement that he was not even present when counsel by their silence consented to allowing the alternates to be present during deliberations. Pet. App. 6a & n.6. Although neither Olano's counsel nor Gray's counsel expressly consented to the procedure, the

[2] The court of appeals rejected Olano's contention that the evidence was insufficient on two other counts. Pet. App. 18a, 22a.

court of appeals "assume[d], *arguendo*, that co-defendant's counsel spoke as counsel for all defendants on this issue." Pet. App. 27a. Nevertheless, because defendants had not personally consented, the court of appeals held that the district court "did not obtain valid consents from the defendants to deviate from Rule 24(c)'s mandatory requirements." Pet. App. 28a.

Finally, the court of appeals concluded that the district court's violation of Rule 24(c) was "inherently prejudicial" to the defendants. The presence of alternates during deliberations "infringes upon the jury's privacy and the secrecy of the jury process." *Id.* The court of appeals found that a court "cannot fairly ascertain" whether alternates participated in deliberations in a given case. Moreover, even if alternates remained silent while in the jury room, they may nonetheless influence the jury through "facial" expressions, gestures or the like." *Id.* (quoting *United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964)). Because of the "difficulty of ascertaining the numerous, and often subtle ways" alternate jurors can affect deliberations, and because "their presence may in fact affect the deliberating jurors' ultimate determination," the court of appeals found it appropriate to treat the violation of Rule 24(c) as inherently prejudicial. *Id.*

SUMMARY OF ARGUMENT

The plain error doctrine of Federal Rule of Criminal Procedure 52(b) authorizes a court of appeals to review "plain errors or defects" that "affect[] substantial rights," even though those errors or defects "were not brought to the attention of the court." Accordingly, errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936), or that would "undermine the fairness of the trial and contribute to a miscarriage of justice," *United States* v. *Young*, 470 U.S. 1, 20 (1985), require reversal.

A. In this case, the court of appeals properly deemed reversible the district court's error of allowing alternate jurors to be present during jury deliberations. That error was plain and obvious and rendered meaningless Congress' absolute command that alternates "shall be discharged" when the jury retires to deliberate. Fed. R. Crim. P. 24(c). The procedure the court proposed and implemented was in direct violation of Rule 24(c), and, in fact, had been expressly rejected by the Advisory Committee as "subject to practical difficulty and to strong constitutional objection." Fed. R. Crim. P. 23(b), advisory committee notes to 1983 amendment (quoting C. Wright, *Federal Practice and Procedure* § 388 (1969)).

B. The district court's error "affect[ed] substantial rights" of Olano. Rule 24(c) protects absolutely the deliberations of the jury from intrusion. Accordingly, the district court's direct affront to Congress' judgment as to what procedure best protects the criminal justice system "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Atkinson*, 297 U.S. at 160.

In addition, the district court's violation of Rule 24(c) affected substantial rights because it was inherently prejudicial to respondents. Petitioner clearly is in error in urging that a defendant asserting plain error on direct appeal must demonstrate "specific prejudice." That standard is reserved for cases involving collateral attacks on convictions that have become final and has no application to this case. *United States* v. *Frady*, 456 U.S. 152, 166 (1982).

Applying the proper standard, the court of appeals correctly recognized that the presence of alternate jurors during deliberations was "inherently prejudicial" to a defendant. A finding of inherent prejudice is proper because preserving the privacy and secrecy of jury deliberations precludes showing prejudice in a particular case, because the very presence of alternates inevitably chills

free and open discussion, and because it is fanciful to suppose that the alternates did not express their views in some manner to the jury.

The record of this case on appeal confirms that the jury here rendered a verdict that was seriously flawed in a number of respects, making its deliberations suspect. Therefore, it is fair to assume that the trial court's error "undermined the fairness of the trial and contributed to a miscarriage of justice." *Young*, 470 U.S. at 16, n.14.

C. Despite the plain and prejudicial error below—an error invited by the district court, not by the defendants, and an error to which the prosecution never objected—the United States urges this Court to uphold Olano's conviction by invoking the assertedly "huge" costs of reversal in this case. Pet. Br. 25-26. But judicial efficiency is no reason to ignore blatant and prejudicial violations of the Federal Rules of Criminal Procedure, and thereby substitute the district court's judgment for that of Congress concerning the proper procedure to ensure the fair *and* efficient conduct of criminal trials.

Moreover, petitioner's position ignores altogether the fundamental predicate of the plain error rule—that the error be plain. Correcting the error here, which was so obvious that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it," *Frady*, 456 U.S. at 163, enhanced, rather than detracted from, the efficient conduct of criminal proceedings and requires reversal of respondents' convictions.

ARGUMENT

THE COURT OF APPEALS CORRECTLY REVERSED THE DISTRICT COURT'S PLAIN ERROR OF ALLOWING ALTERNATE JURORS TO BE PRESENT DURING JURY DELIBERATIONS IN VIOLATION OF FEDERAL RULE OF CRIMINAL PROCEDURE 24(c).

By its terms, Federal Rule of Criminal Procedure 52(b) authorizes courts to notice "plain errors or defects"—errors or defects in the trial that are "obvious." See, *e.g.*, *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); *Peretz* v. *United States*, 111 S. Ct. 2661, 2678 (1991) (Scalia, J., dissenting). The very premise of Rule 52(b) is that certain errors are so obvious that the district court and the prosecutor have a duty to avoid them even if defense counsel fails to sustain an objection over the court's insistence to proceed. The affront to the manifest command of the Federal Rules is attributed to them and the system of justice rightly holds them accountable by setting aside the tainted verdict. As this Court stated in *United States* v. *Frady*, 456 U.S. 152 (1982), Rule 52(b) allows review of an "error so 'plain' that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *Id.* at 163.

The fact that the plain error rule is limited to obvious errors makes it an appropriate exception to the general requirement that a defendant must make and press a contemporaneous objection to preserve an issue for appeal. When an error is obvious, a defendant need not bring "the claim of error to the trial court's attention [to] provid[e] the court an opportunity to resolve the matter as the defendant wishes," Pet. Br. 13; the court—and the prosecutor—are charged with avoiding such errors in order to preserve the "the fairness, integrity [and] public reputation of judicial proceedings."[3] *Atkinson*, 297 U.S.

[3] Likewise, when an error is obvious, the "risk of manipulation by a defendant," Pet. Br. 13, is best avoided by relying on the

at 160. Moreover, the failure of defense counsel to bring to the attention of the court an error that is plain and obvious raises substantial questions about the adequacy of counsel's representation; an appellate court properly is reluctant to hold a defendant bound by counsel's manifest failing. See 3A C. Wright, *Federal Practice & Procedure* § 856, at 341 (2d ed. 1982).

To be sure, not every "obvious" error justifies reversal. But reversal under the plain error standard is required if the error impairs "substantial rights" by affecting significantly the "integrity or public reputation of judicial proceedings" or "by seriously affect[ing] the fairness" of the proceedings. *Atkinson*, 297 U.S. at 160; *United States* v. *Young*, 470 U.S. 1, 20 (1985). In this case, the blatant disregard of Rule 24 affects substantial rights as declared by Congress. At a minimum, the court's insistence on violating an express Federal Rule of Criminal Procedure certainly undermines the integrity of the judicial process. Moreover, the intrusion into the sanctity of the jury deliberations casts serious doubt on the public reputation of the court. Finally, the error is inherently prejudicial and its effect on the seriously flawed jury verdict, in this case, was substantial.

A. The District Court Committed An Obvious And Deliberate Error In Ignoring The Plain Mandate Of Rule 24(c).

The district court's error of allowing alternate jurors to accompany the jury during deliberations was a plain and obvious error.[4] The relevant provisions of Rules 23

district court and the prosecutor to observe the plain and obvious provisions of the law.

[4] As the court of appeals recognized, and petitioner acknowledges, Pet. Br. 10, "Rule 24(c) is phrased in unmistakably mandatory language and does not expressly provide for any waiver" of its protection. Pet. App. 24a-25a. The court of appeals allowed for the possibility of such a waiver, but only where "the record show[s]

and 24 are simple and straightforward. A jury consists of twelve persons, but, with the approval of the court, the defendant and the prosecutor may stipulate in writing to a jury of less than twelve. Fed. R. Crim. P. 23(b). The parties also may stipulate in writing—with the approval of the court—that a verdict may be returned by fewer than twelve jurors if the court must excuse a juror for cause after trial begins. *Id.*

In addition, up to six alternate jurors may be selected. Fed. R. Crim. P. 24(c). If a regular juror is disqualified or becomes unable to carry out his or her duties *before* the jury retires for deliberations, the juror shall be replaced by an alternate. Once the jury has retired, any alternates who have not replaced regular jurors *shall be discharged*. If a regular juror thereafter must be ex-

that the defendants, and not merely their counsel, actually consented to the waiver of their rights." Pet. App. 25a.

This alternative holding is correct. Rule 24(c) must be read in conjunction with Rule 23, which otherwise governs the composition of the jury during deliberations and which requires a defendant personally to consent to waiver of its protections. The two rules are two sides of the same coin; indeed, the 1983 amendment to the Federal Rules, which rejected the substitution of alternates after deliberations had begun in favor of allowing a jury of eleven to return a verdict if the trial court so orders, was made to Rule 23 rather than Rule 24. *See* Fed. R. Crim. P. 23(b), advisory committee notes to 1983 amendment. These closely related provisions should be construed in tandem, with the stated waiver procedures embodied in one naturally applied to the other. *See, e.g.*, 2A N. Singer *Sutherland Statutes & Statutory Construction* § 46.05, at 103 (5th ed. 1992); *see also United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 870-71 (4th Cir. 1964).

It is undisputed that the district court failed to obtain Olano's personal consent to the presence of the alternates in the jury room. Moreover, Olano was not even in the courtroom at the time and so had no opportunity to voice his personal consent or objection to the procedure. *See infra* pp. 15-16. Because Olano "ha[d] no opportunity to object" to the procedure, "the absence of an objection does not thereafter prejudice" him and the violation of the Rule can be reviewed without recourse to the plain error rule. Fed. R. Crim. P. 51.

cused for cause, the court has discretion to allow the remaining eleven jurors to return a valid verdict. Fed. R. Crim. P. 23(b).

The Rules do not permit alternate jurors to be present during jury deliberations, regardless of whether the alternates are instructed not to participate in those deliberations. The Rules do not provide for alternate jurors to be present during a portion of deliberations and thereafter be excused before the jury reaches a verdict. The Rules do not allow replacing a regular juror with an alternate juror, in the event of illness or disqualification, after the jury has retired to deliberate. The language of Rule 24(c) could not be clearer: alternate jurors "shall be discharged" after the jury retires for deliberations.

The procedure followed by the district court in this case was expressly considered and rejected by the Advisory Committee and this Court in drafting and promulgating the Federal Rules. It is striking that the Government's analysis completely ignores this history. Thus, its assertion that the protections of this Rule should be cavalierly ignored is based solely on its self-serving judgments about prejudice. Congress, however, in approving the Rule clearly made the opposite judgment.

An early draft of the Rules provided that alternate jurors should not be discharged until the jury itself was discharged. This Court asked the Committee whether it was satisfied "that it is desirable or constitutional that an alternate juror may be substituted after the jury has retired and begun its deliberation." L. Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 46 (1962). Thereafter, the Committee changed the Rule to require that alternate jurors be discharged when the jury retired, and in that form the Rule was promulgated by this Court and approved by Congress. *Id.* at 50, 53-54.

Subsequently, in 1983, the Advisory Committee considered an amendment to the Rules that would have allowed an alternate juror to be substituted for a regular juror

after the jury retired for deliberations. The Committee rejected that procedure. Instead, it amended Rule 23 to allow, in the district court's discretion and without the agreement of the parties, a valid verdict to be returned by the remaining eleven jurors. In support of its decision, the Committee quoted the following with approval:

> To permit substitution of an alternate after deliberations have begun would require either that the alternate participate though he has missed part of the jury discussion, or that he sit in with the jury in every case on the chance he might be needed. Either course is subject to practical difficulty and to strong constitutional objection.

Fed. R. Crim. P. 23(b), advisory committee notes to 1983 amendment (quoting C. Wright, *Federal Practice & Procedure* § 388 (1969)). The Committee explained specifically that, "[a]s for the possibility of sending in the alternates at the very beginning with instructions to listen but not to participate until substituted, this scheme is likewise attended by practical difficulties and offends 'the cardinal principle that the deliberations of the jury shall remain private and secret in every case.'" *Id.* (quoting *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964)).

As a result, it is not surprising that the courts of appeals—even those on which petitioner otherwise relies, Pet. 7-9; Reply Br. 4-6—have unanimously condemned the failure to abide by the plain terms of Rule 24(c). *United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 873 (4th Cir. 1964) ("We deem it most unwise to place the judicial stamp of approval upon this attempt of court and counsel to circumvent the established rule and to substitute unauthorized procedures"); *United States* v. *Allison*, 481 F.2d 468, 472 (5th Cir. 1973) (Rule 24(c) "is a mandatory requirement that should be scrupulously followed. Because any benefit to be derived from deviating from the Rule is unclear and the possibility of preju-

dice so great, it is foolhardy to depart from the explicit command of Rule 24"); *United States* v. *Reed*, 790 F.2d 208, 211 (2d Cir.) ("We view with disfavor local departures from that norm made on an ad hoc basis and by resort to stipulations, and the procedure followed here should not be repeated"), *cert. denied*, 479 U.S. 954 (1986); *United States* v. *Kaminski*, 692 F.2d 505, 518 (8th Cir. 1982) ("We disapprove this procedure . . ."); *United States* v. *Beasley*, 464 F.2d 468, 470 (10th Cir. 1972) (presence of alternates during deliberations "destroys the sanctity of the jury and a mistrial is necessary"); *United States* v. *Watson*, 669 F.2d 1374, 1391 (11th Cir. 1982) (Rule 24(c) "is couched in mandatory language" and " 'should be scrupulously followed' ") (quoting *Allison*, 481 F.2d at 472).

In the face of this clear and unanimous authority, the district court in this case not only allowed the alternates to accompany the jury during deliberations but affirmatively recommended the procedure to counsel. The district court raised the possibility on its own initiative, explaining that "I know many judges have done it with no objection from counsel." In addition to showing "courtesy" to the alternate jurors, according to the court, "[o]ne of the other things it does is if they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open." J.A. 79. After telling counsel to "[t]hink about it and let me know," the court subsequently raised the matter again with counsel. J.A. 82. This time, counsel for respondent Gray objected. Following an off-the-record discussion, however, counsel acquiesced in the court's suggestion. J.A. 86. The court praised their decision, stating that "I'm kind of glad you reached that decision, Counsel. I kind of think [the alternates] deserve it." J.A. 87. The district court plainly was in error.

The prosecutor likewise was "derelict" in countenancing this error. *United States* v. *Frady*, 456 U.S. 152,

163 (1982). "Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public." ABA, Standards for Criminal Justice, Standard 3-1.1(c) commentary at 3.7 (2d ed. 1980). Thus, as one commentator states, "[i]f the intelligent prosecutor wishes to guard against the possibility of reversible error, he cannot rely on the incompetence or inexperience of his adversary but, on the contrary, must often intervene to protect the defendant from the mistakes of counsel." 8B J. Moore, *Moore's Federal Practice* ¶ 52.02[2], at 52-7 (2d ed. 1991).

In this case, the prosecutor undisputedly was present during all of the exchanges concerning the alternates cited by petitioner. Yet, despite the plain impermissibility of allowing the alternates to be present during deliberations, at no point did the prosecutor object to or raise any question about the procedure suggested by the district court. There is no question that if the prosecutor had informed the district court that the procedure it proposed violated Rule 24(c) or that the Government preferred to comply fully with the Federal Rules, the court would not have continued to pursue it with defense counsel. Therefore, the prosecutor, too, bears responsibility for the plain error.

Finally, defense counsel failed to protect Olano's interests adequately when he did not object to the district court's obvious error. Counsel stood quietly each time the question of the alternates was discussed, expressing neither agreement nor disagreement, and instead allowed co-counsel to speak for him. Even if counsel's silence is taken as consent to the procedure proposed by the district court, consent to such an obvious error itself raises serious question about the adequacy of counsel's representation. Moreover, the court of appeals found "some support" for Olano's statement that he was not even present in the courtroom when consent to the erroneous procedure was

given.[5] Pet. App. 6a & n.6. Because Olano had been present the previous day when Gray's counsel objected to the district court's proposal, Olano had every reason to believe that the alternates would not be allowed to accompany the jurors during deliberations.[6] Under these circumstances, Olano should not be bound by his counsel's inadequacies.[7]

Like a trial lawyer who seeks to stipulate to a particular fact in the hopes of keeping damaging testimony

[5] The record reveals that the marshal frequently failed to return Olano to the courtroom on a timely basis after lunch or other break in trial. J.A. 57-58, 73, 75-76. The exchange at issue occurred almost immediately after lunch. J.A. 85-86.

[6] Olano's ability to make judgments independent of his counsel is demonstrated by counsel's request, on the first day of trial, that Olano be allowed to conduct cross-examination of certain witnesses associated with the Federal Home Loan Bank Board. Counsel assured the court that his client "being a lawyer and being a lawyer who is experienced in banking law, is in a better position to make inquiry of these witnesses," although counsel was willing to see whether "as we get closer in time to these witnesses I can see whether I feel comfortable being in the position to cross-examine witnesses who may very well be key to the government's case against my client." J.A. 63.

[7] Petitioner's assertion that defendants here sought to manipulate the course of these proceedings, Pet. Br. 13-14, is patently ridiculous. Petitioner's suggestion that the defendants intentionally misled the district court at trial so that Olano could raise the issue in his *pro se* brief on appeal with the confidence that the court of appeals would reverse not only his, but also Gray's, convictions is absurd.

It would be more plausible to conclude that the prosecutor agreed to this procedure in order to curry favor with the judge and to ensure that the juror the defense most wanted removed from the jury's deliberations would be present for the presumptively pro-prosecution effect his or her presence might have. The prosecutor might have assumed that any convictions obtained through this procedure ultimately would be upheld on appeal simply because the trial lasted three months and an appellate court might be concerned about the expense of a retrial, precisely the argument the Government makes to this Court. *See* Pet. Br. 25-26.

from being heard directly by the trier of fact, petitioner casually "acknowledge[s]" that the district court violated Rule 24(c). Pet. Br. 10. Petitioner's willingness to concede immediately and unequivocally that error occurred—even if that concession is expressed only in a single, terse paragraph—is telling. The Government does not readily confess error, and its readiness to admit that error occurred here strongly supports the court of appeals' conclusion that the error below was plain.

Although petitioner acknowledges that error occurred, it wholly fails to address whether that error was plain and obvious. Petitioner justifies this failure on the ground that this case turns not on whether the district court committed an error, but rather on "the consequences of that error." *Id.* But the plain error rule does not allow such a facile separation of an error from its "consequences." To the contrary, under the plain language of Rule 52(b), the "consequences" of the district court's violation of the Rule—by which petitioner evidently means whether Olano's convictions should have been reversed—depend not only on whether there was an error, and whether that error was prejudicial, but also on whether the error was plain and obvious. See, *e.g.*, *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); *Peretz* v. *United States*, 111 S. Ct. 2661, 2678 (1991) (Scalia, J., dissenting). The more obvious and unjustified the error, the less reasonable it is to ignore that error unless Congress has clearly indicated that the matter is trivial or the Court can confidently conclude that the error could not possibly have been harmful. Here, the violation of Rule 24(c) requires reversal.

B. The Deliberate Violation Of Federal Rule Of Criminal Procedure 24(c) "Affect[s] Substantial Rights" Within The Meaning Of Rule 52(b).

The second predicate for application of Rule 52(b)—that the error be one "affecting substantial rights"—likewise is satisfied in this case for several reasons, most

of which petitioner ignores. As the court of appeals correctly held, the district court's decision to allow the alternate jurors to accompany the jury during deliberations was "inherently prejudicial" to Olano's substantial rights. Prejudice is inherent in a violation of Rule 24(c), in part because the Rule was adopted in light of the inherent risk of harm, and, in part, because a court cannot evaluate the degree of any "specific" prejudice to the defendant without violating the secrecy and privacy of jury deliberations.

Petitioner argues that the court of appeals' reliance on inherent prejudice was erroneous because it is never appropriate to base a finding of plain error on inherent prejudice, and, in any event, because the presence of alternates is not prejudicial. Petitioner's contention that a finding of "specific prejudice" is necessary to find plain error ignores the language of Rule 52(b), is inconsistent with decisions of this Court, and flatly misconstrues the plain error rule. Likewise, petitioner's speculation that the presence of alternates would have no effect on deliberations is erroneous and merely confirms that a finding of inherent prejudice is warranted—because it is impossible to do anything but speculate about the effect on deliberations without invading the privacy of the jury.

1. *The District Court's Violation Of Federal Rule 24(c) Constituted An Error That Casts Doubt On The Integrity Of The Judicial Process.*

In allowing the alternates to be present during jury deliberations, the district court deliberately ignored Congress' unambiguous command that alternate jurors "shall be discharged" when the jury retires to deliberate. This blatant disregard of a Federal Rule of Criminal Procedure, which incorporates this Court's and Congress' reasoned decisions as to the procedure to be followed in criminal trials and which forecloses the very inquiry into prejudice petitioner asks this Court to undertake, is inherently prejudicial to defendants and "seriously affect[s]

the fairness, integrity [and] public reputation of judicial proceedings." *Atkinson*, 297 U.S. at 160.

a. The Federal Rules of Criminal Procedure represent the considered judgment of this Court and of Congress as to the proper procedures to be followed in criminal prosecutions in the federal courts. The Rules "are intended to provide for the just determination of every criminal proceeding." Fed. R. Crim. P. 2. They apply to "all criminal proceedings" in the United States District Courts, in the United States Courts of Appeals, and in this Court. Fed. R. Crim. P. 54(a). Although the district courts may adopt local rules governing practice before them, those rules must be consistent with the requirements of the Federal Rules. Fed. R. Crim. P. 57.

In this case, petitioner asks this Court to countenance the flagrant disregard of one such rule, Rule 24(c), at the behest of the district court and with the full awareness of the prosecution, on the ground that violation of the Rule would never prejudice defendants. Although petitioner goes on at length about what would not constitute prejudice from a violation of Rule 24(c), it is remarkable that petitioner nowhere suggests what would constitute prejudice. According to petitioner, the silent presence of alternates is not prejudicial. Pet. Br. 23. Nonverbal communication with deliberating jurors through body language is not prejudicial. Pet. Br. 24. Verbal participation in deliberations is not prejudicial. Pet. Br. 22. Even voting for conviction by alternates would not be prejudicial, because under petitioner's analysis that would be no different from being tried by a jury larger than twelve. Pet. Br. 21.

Petitioner does not limit its argument to cases in which defense counsel consented to violation of the Rule, or even to cases in which defense counsel failed to object to the violation, but broadly sweeps in all violations of Rule 24(c). See Reply Br. 3 & n.2. Apparently, petitioner believes the Rule is pointless because no violation of its

terms would ever result in prejudice to defendants. Accordingly, under petitioner's view, the absolute Rule becomes merely precatory: no appellate court could ever enforce its provisions on appeal. In sum, petitioner's argument is nothing more than a direct assault on the judgment of this Court and Congress in adopting Rule 24(c).

The Advisory Committee, this Court, and Congress necessarily rejected petitioner's view in promulgating Rule 24(c). By its terms, the Rule establishes an absolute requirement that alternates be discharged when the jury retires to deliberate. The Rule does not allow the parties to agree to a procedure other than that provided by its terms, nor does it allow the district court to override its protections as a courtesy to the alternates. Indeed, in light of the plain language of Rule 24(c), the practice followed by the district court in this case has absolutely nothing to commend it. If petitioner is correct that the Rule is pointless, which of course it is not, see *infra* pp. 34-42, then the proper course is to amend Rule 24(c) so that alternates' feelings can be protected as the district court proposed. But short of an amendment to the Rule, this Court's and Congress' judgment that prejudice is real should prevail.

The district court's error was not a mere "technical violation" of Federal Rule 24(c), Reply Br. 8, but an absolute and total disregard for the very protection it provides to defendants. The purpose of the Rule is not to allow alternates to go home before the regular jurors. Rather, the Rule requires that alternates be discharged when the jury retires to deliberate to preserve the essential privacy and secrecy of jury deliberations. See *infra* pp. 34-36. By allowing the alternates to be present, the district court invaded the secrecy and privacy of the deliberations. The court violated the Rule by depriving the defendants of the precise protection the Rule was intended to afford. Such an error properly is reversed under the plain error rule.

It is the sort of error that, under *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991), involves a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[8] *Id.* at 1265. The presence during deliberations, the most critical part of trial, of persons who did not share the awesome responsibility of having to decide whether to deprive the defendants of their liberty, goes to the very heart of the jury's decisionmaking process. Indeed, errors affecting the composition of the jury are precisely the sort of errors this Court has held in prior cases to be inherently prejudicial. See, *e.g.*, *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion) (improper excusal for cause of juror who was opposed to death penalty); *id.* at 669 (Powell, J., concurring in part and concurring in the judgment); *Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986) (racial discrimination in selection of members of grand jury).[9]

b. Rather than accepting the judgment of Congress and this Court as established in Rule 24(c), petitioner asks this Court to speculate that violation of the Rule would not be prejudicial to defendants. Petitioner obviously cannot refer to the record to support its position that the presence of the alternates had no effect on the jury's deliberations; there is no record of what was said or done during deliberations. Instead, petitioner can only

[8] Significantly, petitioner does *not* contend that the presence of alternates during deliberations is "trial error," an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1264 (1991).

[9] Even in cases such as *Remmer* v. *United States*, 347 U.S. 227 (1954), in which a juror became aware of an FBI investigation of allegations that he had been improperly contacted concerning the trial, this Court held that prejudice to the defendant should be presumed with the burden to "rest[] heavily" on the Government to disprove the existence of prejudice. *Id.* at 229.

assert that it "defies reality," Pet. Br. 23, is "hard to imagine," *id.* at n.9, and is "quite unrealistic," Pet. Br. 24, to suggest that the presence of the alternates could affect the jury's deliberations. The fact that petitioner can only speculate about the likelihood of prejudice itself demonstrates that blatant violation of Rule 24(c) is inherently prejudicial.

As petitioner acknowledges, this Court has included in the category of errors that are inherently prejudicial "errors whose impact on the trial cannot easily be assessed." Pet. Br. 17. Thus, in *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), the Court held that joint representation of defendants with conflicting interests is inherently prejudicial on the ground that "an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." *Id.* at 491. Similarly, in *Waller* v. *Georgia*, 467 U.S. 39 (1984), this Court unanimously held that violation of the right to public trial is inherently prejudicial. The Court agreed with the Third Circuit's statement that "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.'" *Id.* at 49, n.9 (quoting *United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 608 (3d Cir. 1969)); see *id.* ("'[b]ecause demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied'" (quoting *State* v. *Sheppard*, 438 A.2d 125, 128 (Conn. 1980)).[10]

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[10] *See also Riggins* v. *Nevada*, 112 S. Ct. 1810, 1816 (1992) ("Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different . . . would be purely speculative"); *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 812-13 (1987) (plurality opinion) ("Determining the effect of [the appointment of an interested prosecutor] thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are part of the record") (emphasis omitted); *Vasquez* v. *Hillery*, 474 U.S. 254, 263-64 (1986) (plurality opinion) ("when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained"); *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926) (effect of trial court's inquiry as to numerical division of jury "will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts").

In the present case, assessing the impact of the alternates on the jury's deliberations is likewise impossible. Jury deliberations are secret; no record exists of what is said or done in the jury room.[11] Attempts after the fact to reconstruct the course of deliberations, especially in a complicated case such as this one, would unquestionably fail. As a practical matter, "[i]t would certainly be impossible to recreate at this point every move, every expression [the alternate] might have made during the several hours [—or days—] of deliberations. Even if it were determined exactly what he did or said, it would be difficult to tell how or whether his actions affected the other jurors." *State* v. *Cuzick*, 530 P.2d 288, 290 (Wash. 1975). Indeed, Rule 24(c) was crafted as an absolute rule precisely because of the "practical" problems of sorting out the effects of the alternates' presence during the deliberations. Again, Congress' judgment demands respect from this Court.

Moreover, Federal Rule of Evidence 606 expressly bars juror testimony to "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith."[12] Rule

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[11] Indeed, making such a record is illegal. 18 U.S.C. § 1508; *see infra* pp. 35-36 & n.21.

[12] In its Reply Brief in support of its Petition for Certiorari, petitioner blithely asserts that if a defendant "believes that he

606 is based on the understanding that detailed inquiries into jury deliberations would undermine "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Tanner* v. *United States*, 483 U.S. 107, 120-21 (1987). It is this very undertaking that Congress and this Court sought to foreclose in adopting Rule 24(c), as "[t]he inquiry at a hearing under a standard which requires a showing of prejudice [from the presence of alternates during deliberations] is itself a dangerous intrusion into the proceedings of the jury." *United States* v. *Beasley*, 464 F.2d 468, 470 (10th Cir. 1972); see also *Cuzick*, 530 P.2d at 290 (the "primary effect" of such an investigation "would be to further invade the jury room and impose on those who served on it").

Although the court of appeals relied substantially on the fact that it could not "fairly ascertain whether in a given case the alternate jurors followed the district court's prohibition on participation," Pet. App. 28a, petitioner ignores this consideration altogether. Nowhere in its brief does petitioner address how a court should inquire into whether a defendant suffered "specific prejudice" in a manner that preserves the secrecy of the jury and comports with Federal Rule of Evidence 606(b). Instead,

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may have been prejudiced, the district court has authority to determine 'whether any outside influence was improperly brought to bear upon any juror.'" Reply Br. 6 (quoting Fed. R. Evid. 606(b)). Petitioner overlooks the obvious contradiction between its positions that alternates are an "outside influence" within the meaning of Rule 606(b) but are not "'strangers' to the jury room whose presence constitute[s] a threat to the sanctity of the jury's deliberations." Pet. Br. 24. In any event, examination of jurors as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror" would be insufficient to determine in a meaningful way whether the presence of the alternates prejudiced the defendant in a specific case. *See infra* pp. 34-42.

petitioner asserts that a showing of specific prejudice is required and speculates about why no prejudice is likely. This resort to pure speculation simply confirms that violation of Rule 24(c) is inherently prejudicial.

c. The wisdom of Congress' adoption of an absolute rule is made clear by the actions of the district court in this case. The record shows that it was the court that favored the procedure and that defense counsel decided to go along to avoid offending the court. The district court proposed allowing the alternates to accompany the jury, and explained to defense counsel its view of the advantages of such a procedure while neglecting even to mention any disadvantages. The court thereafter on its own initiative raised the matter again with counsel, and brushed aside Respondent Gray's counsel's objection. Once counsel had agreed with the court's suggestion, however, the court praised the decision and proceeded to do what it had wanted to do all along. The district court should be upholding the categorical protections the Federal Rules provide for defendants, not disregarding them whenever it so chooses.

The district court's deliberate disregard of Rule 24(c) was not an isolated incident, which this Court's grant of certiorari confirms. As the district court said, "many judges have [allowed alternates to be present during deliberations] with no objections from counsel," J.A. 79, although it is impossible to know how often the lack of objection results from counsel giving in to a court's preference. The courts of appeals continue to be faced with cases in which district courts have ignored the plain requirements of Rule 24(c), despite their repeated admonitions that the Rule should be followed. Failing to uphold the court of appeals in this case would send a message to the district courts, as well as to prosecutors, that the Federal Rules do not mean what they say, and that the courts and the parties are free to disregard their plain and unambiguous terms. Only a reversal will stop

this disregard of a plain Federal Rule of Criminal Procedure.

This Court's ability to uphold the court of appeals' necessary and definitive action is not foreclosed by the decision in *United States* v. *Young*, 470 U.S. 1 (1985). In *Young*, this Court reversed a decision by the court of appeals which had held improper argument by the prosecutor to be plain error on the basis of a supervisory rule adhered to by the circuit court. The United States had asserted in *Young* that the prosecutor's argument was not even error because it had been "invited" by improper argument of defense counsel. Brief for the United States at 15-26, *United States* v. *Young*, 470 U.S. 1 (1985) (No. 83-469). This Court rejected the Government's position, finding the prosecutor's argument to be error, but held that it was not plain error under Rule 52(b).

It is true that this Court stated in a footnote in *Young* that "[a] *per se* approach to plain-error review is flawed." 470 U.S. at 16, n.14. This language cannot be divorced from the issue in *Young*, which involved a supervisory rule adopted by a court of appeals. Compare *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988) (court of appeals may not rely on supervisory power to avoid harmless error inquiry). It cannot have the same categorical meaning when the violation is of a plain and clear command of Congress. Congress has determined that Rule 24(c) protects substantial rights of a defendant, and it is not for petitioner or the district court to second-guess that judgment. Just as there cannot be "harmless plain errors," *Young*, 470 U.S. at 16, n.14, so, too, there can not be plain harmless error when the error involves the violation of a Federal Rule of Criminal Procedure that sets out the "framework within which the trial proceeds." *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1265 (1991).

The error at issue in *Young*—improper argument by the prosecutor—is standard "trial error" of the sort that

this Court has held not to be inherently prejudicial. *Id.* at 1263-64. The Court in *Young* had no reason to, and did not, address whether an error that was both plain and inherently prejudicial satisfied Rule 52(b). Indeed, applying the plain error rule to inherently prejudicial errors necessarily requires some sort of *per se* rule. Unlike trial errors, which may "be quantitatively assessed in the context of other evidence presented" in order to determine whether a defendant was prejudiced, *id.* at 1264, by definition, errors that are inherently prejudicial "undermine the fairness of the trial" in every case in which they occur. *Young*, 470 U.S. at 20.

The court of appeals properly found the district court's deliberate disregard for the Federal Rules of Criminal Procedure to be inherently prejudicial to defendants. This unwarranted departure from the unambiguous directive of Congress and this Court "seriously affect[s] the fairness, integrity [and] public reputation of judicial proceedings," *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936), and, accordingly, the court of appeals properly reversed respondents' convictions under Rule 52(b).

2. *The Deliberate Violation Of Federal Rule 24(c) Was Inherently Prejudicial To Respondent Olano's Substantial Rights.*

Petitioner wholly fails to address the serious effect of the district court's deliberate disregard of Rule 24(c) on the integrity of the judicial system and the public reputation of the criminal justice process. As shown above, that effect alone is a sufficient basis upon which to uphold the court of appeals. Instead, petitioner argues that the court of appeals applied an improper standard of prejudice under the plain error rule and asserts that violation of Rule 24(c) is not prejudicial to defendants because the presence of alternates has no effect on the jury's deliberations or verdict. Even if these were proper inquiries, petitioner also is wrong on both counts.

a. *The United States Proposes An Inappropriate Standard For Prejudice Under The Plain Error Doctrine.*

Initially, petitioner is mistaken when it argues that a court may never notice a plain error on the basis of its "inherent prejudice," but instead must find "specific prejudice" to the defendant. Pet. Br. 17. The plain language of Rule 52(b) does not require a finding of specific prejudice to the defendant. Instead, on its face, the Rule permits a court to notice any obvious error that is not harmless within the meaning of Rule 52(a), including errors that are inherently prejudicial.[13] The relevant language of the two provisions is virtually identical: Rule 52(b) provides that a court may notice "[p]lain errors or defects *affecting substantial rights*," while Rule 52(a) provides that "[a]ny error, defect, irregularity or variance *which does not affect substantial rights* shall be disregarded." [14]

The distinction between plain error under Rule 52(b) and non-harmless error under Rule 52(a) is not, as petitioner contends, the degree of prejudice required. Instead, as the language of those provisions makes clear, the principal distinction is that the plain error rule applies only to *plain* errors, while the harmless error rule applies to all errors. Any error, even an error that is not obvious, can affect substantial rights. An error that does not affect substantial rights "shall be disregarded" under

[13] *See Peretz* v. *United States*, 111 S. Ct. 2661, 2679 n.* (1991) (Scalia, J., dissenting) (because error not obvious, there is "no occasion to assess its prejudicial impact, *assuming that t is possible*") (citing *Gomez* v. *United States*, 490 U.S. 858, 876 (1989)) (emphasis added).

[14] It is a longstanding rule of statutory construction that, in construing a statute or rule, similar language in related provisions should be construed as having the same meaning. *See, e.g., Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932); 2A N. Singer, *Sutherland Statutes & Statutory Construction* § 47.16, at 184 (5th ed. 1992).

Rule 52(a) and cannot be noticed under Rule 52(b). But an error that does affect substantial rights, if not brought to the attention of the court, can only be noticed under Rule 52(b) if it is plain and obvious, which is this case.

Petitioner's examples of cases that purportedly "illustrate the different status of claims of 'inherent prejudice' under the harmless error and plain error rules," Pet. Br. 19, do nothing of the sort. Rather, they simply illustrate errors that, while inherently prejudicial, cannot fairly be characterized as plain. *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984), and the right of self-representation, is most telling in this regard. While a defendant plainly has a right to represent himself if he or she so desires, there is no obvious error in appointing counsel to represent him if he does not assert that right. To the contrary, the United States Constitution requires that counsel be appointed in such circumstances.[15] *Gideon* v. *Wainwright*, 372 U.S. 335, 343-44 (1963); see *Faretta* v. *California*, 422 U.S. 806, 835-36 (1975). It is no error at all, much less an obvious one, for the court to carry out the constitutionally mandated right to counsel.

Likewise, the waiver cited by petitioner as occurring in *Levine* v. *United States*, 362 U.S. 610 (1960), involved

[15] As the cases cited by petitioner explain, Pet. Br. 20, "[b]ecause the exercise of the right of self-representation necessarily involves a waiver of the preeminent right to the assistance of counsel, the stringent limitations established by the Supreme Court for the waiver of the right to counsel necessarily define the requirements for exercise of the right of self-representation." *United States* v. *Weisz*, 718 F.2d 413, 425 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984). Thus, the right of self-representation "can only be invoked by waiving counsel expressly, knowingly, and intelligently," *United States* v. *Gillis*, 773 F.2d 549, 559 (4th Cir. 1985), and "[i]f on arraignment an indigent defendant stands mute, neither requesting counsel nor asserting the right of self-representation, an attorney must be appointed" because the defendant has not waived the right to counsel. *Brown* v. *Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982) (en banc).

contempt proceedings before a grand jury in which any denial of the right to public trial was not obvious. "Unlike an ordinary judicial inquiry, where publicity is the rule, grand jury proceedings are secret." *Id.* at 617. The Court recognized that the necessary first step in the contempt proceedings was to read the record of the grand jury proceedings in which the contempt occurred, and that federal law required that step to be conducted without the public being present in the courtroom. See 18 U.S.C. § 1508; Fed. R. Crim. P. 6(d) & (e). Because "[t]he proceedings properly began out of the public's presence and one stage of them flowed naturally into the next," "[t]here was *no obvious point at which*, in light of the presence of counsel, it can be said that *the onus was imperatively upon the trial judge to interrupt the course of proceedings upon his own motion* and establish a conventional public trial." 362 U.S. at 619 (emphasis added).[16]

Accordingly, the court of appeals' holding does not, as petitioner asserts, confuse plain error with non-harmless error. While undeniably a "determination that a particular error can never be harmless within the meaning of Rule 52(a) does not . . . mean that such an error is always 'plain' within the meaning of Rule 52(b)," Pet. Br. 17-18, the court of appeals did not hold otherwise. Instead, that court quite properly held, first, that the district court's error was plain, and, second, that it was inherently prejudicial. Pet. App. 23a-30a. In mischaracterizing the court of appeals' holding, petitioner simply ignores that an error must be plain to be noticed under Rule 52(b).

For these reasons, petitioner is wrong when it suggests that only a requirement of "specific prejudice" can avoid

[16] The other case on which petitioner relies is *Davis* v. *United States*, 411 U.S. 233 (1973). But *Davis* involved a claim for post-conviction relief under 28 U.S.C. § 2255, as petitioner concedes, Pet. Br. 19-20; *see Davis*, 411 U.S. at 235, and so has no application to review of a plain error on direct appeal. *See infra* pp. 31-33.

turning every non-harmless error into a plain error. But not only is a requirement of specific prejudice inconsistent with the plain language of Rule 52(b), it also is inconsistent with this Court's previous decisions distinguishing errors on direct appeal and errors on collateral review. In effect, petitioner seeks to have this Court adopt on direct criminal appeals the "actual prejudice" standard of *Wainwright* v. *Sykes*, 433 U.S. 72 (1972), a standard applied only to defendants seeking post-conviction relief from a criminal conviction. In such cases, the strong interest in finality of judgments requires a showing of cause and actual prejudice before a federal court will overturn a criminal conviction. Because that interest is not at stake when the courts of appeals consider the direct appeal of a criminal conviction, not even under the plain error rule, a less exacting standard of prejudice than that sought by petitioner is proper under Rule 52(b).

Although petitioner carefully avoids labelling its analysis "actual prejudice," its reliance on *Davis* v. *United States*, 411 U.S. 233 (1973)—the only case it cites as requiring a showing of "specific prejudice" to review an inherently prejudicial error not raised at trial, Pet. Br. 19-20—lays bare the true nature of its argument.[17] As petitioner concedes, *Davis* is a case decided under 28 U.S.C. § 2255, the statute governing post-conviction relief for federal prisoners. Davis' conviction had been affirmed on appeal, and one round of post-conviction mo-

[17] This Court, and the courts of appeals, have treated the phrases "actual prejudice" and "specific prejudice" as interchangeable. *See, e.g., Chandler* v. *Florida*, 449 U.S. 560, 588 (1981) (White, J., concurring in the judgment); *United States* v. *Gambino*, 926 F.2d 1355, 1364 (3d Cir.), *cert. denied*, 112 S. Ct. 415 (1991); *United States* v. *Jenkins*, 904 F.2d 549, 556 (10th Cir.), *cert. denied*, 111 S. Ct. 395 (1990); *Aldrich* v. *Wainwright*, 777 F.2d 630, 634 (11th Cir. 1985), *cert. denied*, 479 U.S. 918 (1986); *United States* v. *Kimmel*, 741 F.2d 1123, 1126 (9th Cir. 1984); *United States* v. *Maybusher*, 735 F.2d 366, 369 (9th Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985).

tions had been filed and denied before Davis raised his constitutional challenge to the composition of the grand jury. Nevertheless, petitioner asserts that "the principle for which [*Davis*] stands is equally applicable to the plain error doctrine." Pet. Br. 20.

Petitioner's assertion is flatly inconsistent with the "well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States* v. *Frady*, 456 U.S. 152, 166 (1982). Once a criminal conviction has become final, "society's legitimate interest in the finality of the judgment" becomes paramount. *Id.* at 164. "One of the law's very objects is finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known." *McCleskey* v. *Zant*, 111 S. Ct. 1454, 1468 (1991); see also *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect"). Moreover, once a defendant has had the opportunity for appellate review of his or her conviction—including review by the court of appeals for plain error under Rule 52(b)—the courts are "entitled to presume he stands fairly and finally convicted." *Frady*, 456 U.S. at 164. But such considerations do not apply to this case. Olano's convictions are not final.

Thus, this Court has held clearly that the standard of prejudice required to excuse a procedural default on post-conviction review is more exacting "than the showing required to establish plain error on direct appeal." *E.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). The decision in *Frady* v. *United States* is directly on point. In *Frady*, the court of appeals had applied Rule 52(b) in a proceeding under Section 2255 to notice an error that had occurred at the original trial of the defendant. This Court reversed, concluding that "[b]ecause it was intended for use on direct appeal, . . . the 'plain error' standard is out of place when a prisoner launches a

collateral attack against a criminal conviction." 456 U.S. at 164. Instead, a "significantly higher hurdle" must be met": "the 'cause and actual prejudice' standard" of *Davis* and *Wainwright* v. *Sykes*. *Id.* at 166-67. The Court then proceeded to reject Frady's contention that he had suffered "prejudice *per se*" from the district court's error, finding that Frady had not suffered the actual prejudice necessary on post-conviction review. *Id.* at 170-74.

Petitioner now seeks to have this Court ratchet up the standard for plain error review to the level of actual prejudice, a standard that is applied only collaterally. Fundamental fairness and *Frady* require rejection of this argument.[18] This Court has squarely held that it is inappropriate to review a "§ 2255 motion under the same standard as would be used on direct appeal, as though collateral attack and direct review were interchangeable." *Id.* at 165. The actual prejudice standard of *Davis* and *Frady* does not apply to Rule 52(b). The court of appeals properly relied on the inherent prejudice that results from violation of Rule 24(c) in reversing the district court's plain error.

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[18] In essence, what petitioner seeks is a rule that errors such as this one, which are deemed inherently prejudicial because finding specific prejudice is impossible, *see supra* pp. 21-25, can never be noticed as plain error. In other words, petitioner asks this Court to hold that representation by counsel with a conflict of interest, *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978), trial by a biased decisionmaker, *Gray* v. *Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion), or by a judge or prosecutor with a financial interest in the case, *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 809-14 (1987) (plurality opinion)—all errors that deny a defendant the right to a fair trial yet "whose impact on the trial cannot easily be assessed," Pet. Br. 17—are errors that an appellate court can never correct under the plain error rule. Such a blanket limitation is unwarranted and should be rejected.

b. *Under The Proper Standard, Rule 24(c) Reflects Congress' Judgment That Allowing Alternates To Be Present During Jury Deliberations Is Prejudicial.*

Petitioner likewise is incorrect in asserting that violation of Rule 24(c) will not prejudice defendants. The presence during deliberations of alternates, who do not share with the jury the "awesome responsibility to decide," will stifle free and open discussion among the jurors, the very foundation of the deliberative process. Moreover, it is wholly unrealistic to presume that the alternates sat silent and motionless for the full week the jury deliberated. Even if the alternates did not "participate" in deliberations, it is inevitable that, subtly or unintentionally, they communicated their views to the other jurors.

First, the presence of alternates during jury deliberations "offends 'the cardinal principle that the deliberations of the jury shall remain private and secret in every case.'" Fed. R. Crim. P. 23(b) advisory committee notes to 1983 amendment (quoting *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964)). The privacy of jury deliberations is a time-honored and fundamental aspect of trial by jury. "It is a cardinal principle of the jury system that a jury must deliberate in private." *Goby* v. *Wetherill*, 2 K.B. 674, 675 (1915) (Shearman, J.). "When the jury retire from the presence of the court, it is in order that they may have opportunity for private and confidential discussion, and the necessity for this is assumed in every case . . . ." *People* v. *Knapp*, 3 N.W. 927, 929 (Mich. 1879).

Secrecy and privacy of deliberations ensures full and frank discussion by the jury. *E.g.*, *McDonald* v. *Pless*, 238 U.S. 264, 267-68 (1915). This "discussion and free exchange of ideas" is "the very basis for common judgment among the jurors, upon which the institution of

trial by jury is based." [19] Moreover, free and open deliberation provides a very real protection for the accused: research into jury decisionmaking reveals that, all else equal, the process of deliberation results in the jury's being more lenient toward defendants.[20]

The presence during deliberations of any person who is not a member of the jury inevitably threatens the deliberative process. Indeed, Congress has made it a criminal offense for any person who is not a member of the jury to listen to or observe jury deliberations. 18 U.S.C. § 1508.[21] Section 1508 was enacted during the 1950's in response to breaches in the privacy of the jury room by researchers secretly recording deliberations. Even though the jurors themselves were unaware that their delibera-

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[19] Letter from Deputy Attorney General William P. Rogers to Harley M. Kilgore, Chairman, Senate Comm. on the Judiciary, in support of S.2887, *reprinted in* H.R. Rep. No. 2807, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 4149.

[20] *See, e.g.*, R. MacCoun & N. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. Personality & Social Psych. 21, 29 (1988); G. Stasser *et al.*, *The Social Psychology of Jury Deliberations: Structure, Process, and Product*, in *The Psychology of the Courtroom* 221, 247-51 (N. Kerr & R. Bray eds., 1982); N. Kerr, *Social Transition Schemes: Charting the Group's Road to Agreement*, 41 J. Personality & Social Psych. 684, 691 (1981). The likely explanation for this so-called "leniency effect" is the constitutional requirement that proof in criminal cases must establish guilt beyond a reasonable doubt. MacCoun & Kerr, *supra*, at 30.

[21] Section 1508 provides in relevant part as follows:

> Whoever knowingly and willfully, by any means or device whatsoever—
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> (a) records, or attempts to record, the proceedings of any grand or petit jury in any court of the United States while such jury is deliberating or voting; or
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> (b) listens to or observes, or attempts to listen to or observe, the proceedings of any grand or petit jury of which he is not a member in any court of the United States while such jury is deliberating or voting shall be fined not more than $1000 or imprisoned not more than one year, or both.

tions were being recorded, Congress found "no need to belabor the point that such deliberations of the juries should be protected in order to insure the privacy of their actions. The secrecy of jury deliberations . . . should be protected at all times and under all circumstances." H.R. Rep. No. 2807, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 4149, 4150. The public policy favoring complete jury privacy is thus plain and overwhelmingly accepted.

Petitioner agrees that allowing the privacy and secrecy of deliberations to be breached poses the "danger that '[f]reedom of debate might be stifled and independence of thought [might be] checked.'" Pet. Br. 22 (quoting *Clark* v. *United States*, 289 U.S. 1, 13 (1933)). This concession should end the dispute. But petitioner argues, nevertheless, that alternates were not "'strangers' to the jury room whose presence constituted a threat to the sanctity of the jury's deliberations." Pet. Br. 24. According to petitioner, because the alternates were subjected to *voir dire* and sat through the trial not knowing they would later be named alternates, their presence would not "fundamentally alter[] the jury's deliberative process." Pet. Br. 23.

Petitioner's contention, that an alternate "has no more and no less information about the case than any other juror, and is no more biased or unduly influenced than any other juror," *id.* (*quoting Johnson* v. *Duckworth*, 650 F.2d 122, 125 (7th Cir.), *cert. denied*, 454 U.S. 867 (1981)), is simply beside the point. Petitioner's assumption that "there is as much reason to assume the alternate jurors favored acquittal as there is to think they favored conviction," Pet. Br. 21—an assumption that is false, as explained below, see *infra* pp. 39-40—has nothing to do with the likely effect on deliberations of their silent presence in the jury room.[22] Someone who is equally

[22] Surely petitioner does not suggest that other neutral participants in the trial, such as the bailiff, the trial judge, or the judge's law clerk, who also would not be "strangers" to the jury at the close of a three-month trial, can freely sit in on deliberations. No doubt they would be as curious about what goes on in the jury room as the alternates—perhaps more so—but that cannot justify turning the jury's deliberations into a spectator event.

familiar with the case, and not disqualified for bias, can nevertheless have an inhibiting effect on deliberations among those vested with the responsibility to decide difficult cases. This Court is well aware of the importance of privacy and secrecy while deliberating, as only the justices themselves are present at conference. No exception is made, for instance, for retired justices to sit in at conference simply because they are not strangers to the process.

Moreover, that alternates are not "strangers" to the jury in the literal sense of the word does not mean that their presence is innocuous. The awkward silence of a friend, if indeed the jurors were on such terms with the alternates, can be even more inhibiting than the expected silence of a stranger. If, over the course of the three-month trial, the jurors grew accustomed to group conversation in which the alternates participated, the forced silence of the alternates could well inhibit discussion by the remainder. Jurors who were used to hearing approval from, or who appreciated confiding in, or who enjoyed disagreeing with those persons who became alternates—concerning subjects from the weather to politics to the NBA playoffs—could now be met with only stony silence and a blank stare when discussions turned to the case at hand, the subject that had occupied their shared attention for three months.

In short, the presence during deliberations of an alternate, "as one not obligated to express an opinion, not committed to the decision that was ultimately reached, not faced with the awful responsibility to decide, could not have gone unnoticed by the 12 formally empaneled jurors and may well have affected their willingness to speak."

State v. Cuzick, 530 P.2d 288, 289-90 (Wash. 1975). Even if the alternates did not participate in deliberations in any manner whatsoever, their very presence with the jury was prejudicial.

Second, it is fanciful to assume that alternates will not communicate their views on the case to the regular jurors, to the prejudice of defendants. " 'It would be understandably difficult for an alternate to remain locked up with regular jurors, perhaps for days, without at some time, during heated discussions, reflecting agreement or disagreement, support or opposition, encouragement or disapproval, praise or derision, hope or frustration, or any of countless other emotions.' " *Commonwealth* v. *Smith*, 531 N.E.2d 556, 560 (Mass. 1988) (quoting *People* v. *Valles*, 593 P.2d 240 (Cal. 1979) (Mosk, J., dissenting)). The picture that petitioner draws of the alternates sitting silent, still, and stone-faced during day after day of extended and sometimes heated deliberations is simply not credible.

Even if the alternates "heeded the letter of the court's instructions and remained *orally* mute throughout, it is entirely possible that [their] attitude, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." *United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964) (emphasis in original). Most communication in fact is nonverbal: one authority estimates that less than 10 percent of the communication of feelings is verbal, while over 50 percent results merely from facial expressions. A. Mehrabian, *Nonverbal Communications* 182 (1972).[23] A raised eyebrow, a smile or smirk, a bored sigh, a slow nod or shake of the head, a stifled laugh—

[23] Manuals instructing lawyers on conducting jury trials stress the importance of persuading the jury by means of nonverbal communication. *See, e.g.*, W. Abbott, *Surrogate Juries* § 2.02(b) (1990); S. Hamlin, *What Makes Juries Listen* 423-58 (1985).

any of these could communicate the alternate's views as effectively as actual oral participation in the deliberations.

The procedure followed in this case, whereby the alternates did not learn they would be alternates until the end of trial, only heightens—not lessens, as petitioner asserts, Pet. Br. 23-24—the likelihood of prejudice. As petitioner explains, the alternates were treated identically to the regular jurors for the entire three-month trial and were not even identified as alternates until shortly before retiring to the jury room for deliberations. *Id.* Up until the very end of trial, they expected to participate in those deliberations as regular jurors. Under these circumstances, it is virtually certain that the alternates would succumb to the urge to communicate their views in some way to the jurors.

Petitioner asserts, based on nothing more than its own speculation, that there is no reason to believe that the presence of the alternates in the jury room under these circumstances would be prejudicial to defendants.[24] *Id.* Petitioner is mistaken. Alternates differ from jurors in a vital respect: as petitioner concedes, "alternates are 'not committed to the decision that [is] ultimately reached, [and are] not faced with the awful responsibility to decide." *Id.* at n.9 (quoting *State* v. *Cuzick*, 530 P.2d 288, 289-90 (Wash. 1975)). Because an alternate does not share the all-important sense of responsibility

[24] Petitioner even asserts that actual participation in deliberations by an alternate, contrary to the express instruction of the trial court, would not be prejudicial, Pet. Br. 22, a contention that even those courts of appeals requiring a showing of actual prejudice have rejected. *See United States* v. *Watson*, 669 F.2d 1374, 1391 (11th Cir. 1982) ("If the alternate deliberated with the jury on the question of guilt, . . . then reversal and a new trial would be mandatory"); *United States* v. *Allison*, 481 F.2d 468, 472 (5th Cir. 1973) ("sufficient prejudice and effect on the jury's verdict would be shown and, therefore, a new trial required if the alternate disobeyed the court's instructions and in any way participated in the jury deliberations").

with the jury, he or she necessarily will have a different perspective on the case, which may take less seriously the important protections afforded to defendants by the criminal justice system.[25]

Only a juror who knows that he or she must decide whether to deprive the defendants of their freedom will completely understand the gravity of what is at stake and fully appreciate the importance of reasonable doubt and the presumption of innocence. It is because the jurors are "aware of their responsibility and power over the liberty of the defendant" that in *Johnson* v. *Louisiana*, 406 U.S. 356, 361 (1972), this Court believed majority jurors would continue to deliberate conscientiously even though they had already arrived at a sufficient majority to convict. It is because the jurors are "conscious of the gravity of their task" that this Court presumes they will "strive to understand, make sense of, and follow the instructions given them." *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985). Thus, the courts consistently have held instruction or argument to the jury that tends to lessen its sense of responsibility for its decision to be prejudicial to the defendant. See *Caldwell* v. *Mississippi*, 472 U.S. 320, 333-34 (1985); *United States* v. *Fiorito*, 300 F.2d 424, 426-27 (7th Cir. 1962). Because alternates do not share with the jurors the responsibility that goes with being the ultimate decisionmaker, there is every reason to believe that their presence during deliberations is prejudicial to defendants.

Petitioner also offers as a "common sense proposition" that "[a]ny juror who favors acquittal and is resolute

[25] Petitioner states that the Constitution does not preclude a jury larger than twelve. Pet. Br. 22. This argument is beside the point. The Federal Rules do not authorize a jury of fourteen to sit in criminal cases, and a jury of fourteen did not sit in this case. Instead, a jury of twelve retired for deliberations, with one alternate present for all of deliberations and another present for part. Olano was prejudiced precisely because the alternates did not share with the jurors their responsibility to decide.

enough to resist the facial expressions and gestures of the regular jurors—not to mention their attempts at oral persuasion—would not be swayed in favor of conviction by the expressions or gestures of an alternate." Pet. Br. 24. To the contrary, research into jury decisionmaking makes very clear that one additional expression of support for conviction can make all the difference between a jury that convicts and a jury that acquits. The nature of small group decisionmaking is such that the larger an initial majority, the more likely that majority's position will prevail.[26] Thus, this Court has consistently held that an error affecting even one juror requires reversal, without any inquiry into whether the rest of the jury might have been "resolute enough to resist" that juror's views. See, *e.g.*, *Morgan* v. *Illinois*, 112 S. Ct. 2222, 2229-30 (1992).

Petitioner asserts further that "[j]ust as the alternates are presumed to have followed the instruction not to participate, the regular jurors should be presumed not to have allowed themselves to be influenced by any actions of the alternates." Pet. Br. 4. But the district court did not instruct the regular jurors "not to . . . allow[] themselves to be influenced by any actions of the alternates," to disregard the actions of the alternates, or anything of the sort. Instead, the district court's instruction is directed specifically at the alternates:

> [W]hat we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to the law, the

[26] *See, e.g.*, N. Kerr, *supra* note 20, at 690 ("Group members were more likely to join a majority than to defect from one . . ., and this drawing power increases with the size of the majority . . ."); N. Kerr & R. MacCoun, *The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberation*, 48 J. Personality & Social Psych. 349, 357 table 3 (1985); R. Hastie *et al.*, *Inside The Jury* 106-08 (1983); B. Grofman, *Not Necessarily Twelve and Not Necessarily Unanimous: Evaluating the Impact of* Williams v. Florida *and* Johnson v. Louisiana, in *Psychology and the Law* 149, 162-63 (G. Bermant *et al.* eds., 1976).

> alternates must not participate in the deliberations. It's going to be hard, but if you are an alternate, we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we want you to be able to step in having heard the deliberations. But we are going to ask that you not participate.

J.A. 89-90. Because the jurors were not instructed to disregard the presence of the alternates, or to disregard anything said or done by the alternates, a presumption that the jury followed its instructions does not help petitioner.

Finally, petitioner argues that counsel's consent indicates that there likely was no prejudice in this case. Pet. Br. 25. That argument assumes, however, that counsel's consent is sufficient and that specific prejudice in this case is necessary, assumtpoisn that are unwarranted. See *supra* note 4 & pp. 28-33. Moreover, nothing in the record suggests that counsel's "consent" was calculated on the basis of jury prejudice rather than to appease a judge who clearly did not want to follow the unambiguous dictates of Rule 24.

c. *The Convictions In This Case Were Of Questionable Merit Making The Presence Of The Alternates During Jury Deliberations Likely To Have Affected The Jury's Verdict.*

The correctness of the court of appeals' holding is underscored by the fact that this was a jury that plainly got it wrong. Although it is impossible to determine what effect the alternates had on deliberations in this case, there is every reason to believe that the district court's obvious error "undermined the fairness of the trial and contributed to a miscarriage of justice."[27] *United States* v. *Young*, 470 U.S. 1, 16, n.14 (1985).

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[27] A defendant need not "establish that under the probative evidence he has a colorable claim of factual innocence," *Sawyer* v. *Whitley*, 112 S. Ct. 2514, 2519 (1992) (quoting *Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986)), for a court to notice plain error under Rule 52(b). Although this Court has referred interchangeably to the "miscarriage of justice, or 'actual innocence' exception" to rules governing successive petitions and procedural default on post-conviction review, that "narrow" exception applies only in cases in which a prisoner "cannot meet the cause and prejudice standard." *Id.* at 2518-19. Since the cause and actual prejudice standard is demonstrably more exacting than the standard that must be met under the plain error rule, *see supra* pp. 31-33, it cannot be, and petitioner does not contend, that a showing of actual innocence is necessary for Rule 52(b) to apply.

Of greatest significance is the fact that the court of appeals reversed two of the counts on which Olano was convicted and three of the counts on which Gray was convicted for insufficiency of the evidence. Pet. App. 17a, 20a. Petitioner no longer challenges the court's conclusion that no reasonable jury could have convicted respondents on those counts. Pet. 5, n.1. Yet, this jury did.

Moreover, the Government's case against all of the defendants was exceedingly weak. Three of the seven co-defendants at trial were acquitted on all counts by the jury. Two more were convicted on only one count, and that count was reversed on appeal. *United States* v. *Hilling*, 891 F.2d 205 (9th Cir. 1988). As noted, two of the counts on which Olano was convicted and three of the counts on which Gray was convicted were reversed by the court of appeals for insufficient evidence.[28] Their remaining convictions were reversed because of the plain error at issue here, although the court of appeals noted but did not address other "substantial issues" that re-

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[28] Of course, that the court of appeals upheld the sufficiency of the evidence in support of several of the counts, Pet. App. 18a, 22a, does not demonstrate that the Government's case against Olano was strong. It indicates merely that as to those counts, unlike those the court of appeals reversed, there was enough evidence so that a reasonable jury could convict. *See United States* v. *Lane*, 474 U.S. 438, 450 n.13 (1986) ("the threshold of overwhelming evidence is far higher than mere sufficiency to uphold conviction"); *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946).

spondents had raised concerning the legality of their convictions. Pet. App. 3a, n.3.

Petitioner does not and could not contend that the evidence against Olano and Gray was "overwhelming" or "beyond any doubt," as it was in *Young*. Compare 470 U.S. at 19-20. The court of appeals was fully familiar with the lengthy record in this case, and reversed the district court's error under Rule 52(b). The court of appeals' determination should be upheld.

C. The Government's Desire To Save The Cost Of Retrial Provides No Justification For Ignoring The District Court's Deliberate Violation Of Rule 24 In This Case.

At bottom, petitioner seeks to have this Court redeem the Government's total failure in this purportedly "important prosecution," Pet. 6, on the ground that "[t]he costs of a reversal in this case are huge." Pet. Br. 26. This pursuit of false "judicial economy" should be rejected.

Petitioner exaggerates the costs of a new trial. Any retrial would not require "the investment of three months of trial time by the court, court personnel, the jury, witnesses, and counsel," *id.*, because double jeopardy bars a new trial on much of the Government's case. Moreover, the fact that "five years have passed since the trial" because of the lengthy proceedings before the court of appeals, Pet. Br. 26, cannot fairly be held against Olano, who filed his notice of appeal on September 30, 1987, only five days after he was sentenced. J.A. 7.

In any event, it is the district court and the prosecution that justly bear responsibility for the costs and difficulties of any retrial. The court deliberately and blatantly disregarded the unambiguous requirements of Rule 24(c), by suggesting that the alternates be allowed to be present during deliberations, convincing defense counsel not to object, and ultimately implementing its preferred procedure. Likewise, the prosecutor, whose duty is not

merely to convict but to act in the interests of justice, see *supra* p. 15, had ample opportunity to correct the district court's manifest error at trial and yet failed to do so.

The plain error rule is based on an altogether different premise about the efficient conduct of trials than that offered by petitioner. The plain error rule provides for the review only of an "error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Such errors are best deterred, not by holding the defendant responsible for the inadequacy of his counsel, but by reversing the tainted conviction because of the failing of the district court and the prosecutor. Enforcement of the plain error rule in this case will ensure that a district court "promotes judicial economy," not by convincing counsel to agree to ad hoc modifications of this Court's and Congress' considered judgments about the appropriate procedures to follow at criminal trials, but by adhering to the plain and obvious requirements of the Federal Rules.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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